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## BEFORE THE ARIZONA CORPORATIC

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CITY OF PEORIA, ARIZONA AND

DIAMOND VENTURES INC.'S

JOINT PRE-HEARING

MEMORANDUM OF LAW

IN THE MATTER OF THE APPLICATION OF )  
 ARIZONA PUBLIC SERVICE COMPANY, IN )  
 CONFORMANCE WITH THE REQUIREMENTS )  
 OF ARIZONA REVISED STATUTES §§ 40-360, et )  
 seq., FOR A CERTIFICATE OF )  
 ENVIRONMENTAL COMPATIBILITY )  
 AUTHORIZING THE TS-5 TO TS-9 500/230 kV )  
 TRANSMISSION LINE PROJECT, WHICH )  
 ORIGINATES AT THE FUTURE TS-5 )  
 SUBSTATION, LOCATED IN THE WEST HALF )  
 OF SECTION 29, TOWNSHIP 4 NORTH, RANGE )  
 4 WEST AND TERMINATES AT THE FUTURE )  
 TS-9 SUBSTATION, LOCATED IN SECTION 33, )  
 TOWNSHIP 6 NORTH, RANGE 1 EAST, IN )  
 MARICOPA COUNTY, ARIZONA. )

## I.

## INTRODUCTION

Pursuant to Administrative Law Judge Sarah Harpring's oral directive from the bench during the October 6, 2014 Procedural Conference conducted in the above-captioned and above-docketed proceeding ("Instant Proceeding"), the City of Peoria, Arizona ("Peoria") and Diamond Ventures, Inc. ("DVI") submit their Joint Pre-Hearing Memorandum of Law on the following questions:

1. What standard(s) should govern a decision by the Arizona Corporation Commission ("Commission") as to whether to amend or modify the Commission's Decision No. 70850 in the limited manner requested by Arizona Public Service Company ("APS") in the Application filed by APS on July 17, 2014 in the Instant Proceeding?<sup>1</sup>

<sup>1</sup> As stated by respective counsel for Peoria and DVI during the October 6, 2014 Procedural Conference, as of this

LAWRENCE V. ROBERTSON, JR.  
 ATTORNEY AT LAW  
 P. O. Box 1448  
 Tubac, Arizona 85646

2. What burden of proof should the Commission require be satisfied by APS in order to warrant an amendment and modification of Decision No. 70850 in the manner requested by APS in the aforesaid Application?

## II.

### DISCUSSION

#### A. Applicable Decision Making Standard(s).

The statutory scheme governing the siting of power plants and transmission lines set forth at A.R.S. §§ 40-360 et seq. does not expressly contemplate or address what decision making standard(s) or factor(s) are applicable when the Commission decides to exercise its authority under A.R.S. § 40-252 for the purpose of determining whether or not to amend or modify a decision previously issued by the Commission pursuant to A.R.S. § 40-360.07. However, there is language within that statutory scheme which provides guidance as to how the Commission should proceed in such circumstance incident to reaching a final decision on a subsequent request for modification or amendment pursuant to A.R.S. § 40-252.<sup>2</sup>

More specifically, A.R.S. § 40-360.07 prescribes the decision making standard(s) that the Commission is to adhere to in determining whether or not to confirm, deny or modify a Certificate of Environmental Compatibility ("CEC") granted by the Siting Committee. In essence, a two-step process is involved. First, the Commission must determine whether or not the record presented to it reflects that adequate consideration has been given to those decision making factors specified at A.R.S. § 40-360.06, which govern the Siting Committee's decisional process. Second, the Commission must determine in addition whether or not a granting of the CEC in question would

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juncture, Peoria and DVI have no position on any of the changes to Decision No. 70850 (and the transmission corridor therein approved) requested by APS.

<sup>2</sup> In that regard, incident to an exercise of its discretion under A.R.S. § 40-252, the Commission has both the authority and the discretion to determine (i) whether the situation then before it can be resolved on the basis of a Commission Staff Report or requires the conduct of an evidentiary hearing; and, if the latter, (ii) whether the hearing should be conducted by one of the Commission's Administrative Law Judges or the Power Plant and Transmission Line Siting Committee ("Siting Committee"). Simply stated, within the context of a proceeding under A.R.S. § 40-252, the question is who will develop the information upon which the Commission will base its decision. In this instance, the Commission has opted for an evidentiary record developed by an Administrative Law Judge.

1 "... balance, in the broad public interest, the need for an adequate, economical and  
2 reliable supply of electric power with the desire to minimize the effect thereof on  
the environment and ecology of the state." [A.R.S. § 40-360.07(B)]<sup>3</sup>

3 These same decision making standards should apply to any subsequent decision issued by  
4 the Commission under the auspices of A.R.S. § 40-252 which amends or modifies a decision  
5 previously issued pursuant to the decisional standards set forth in A.R.S. §§40-360.06 and 40-  
6 360.07. To require lesser standards in connection with an exercise of the Commission's authority  
7 pursuant to A.R.S. § 40-252 would in effect emasculate the legislative purpose and requirements of  
8 A.R.S. § 40-360 et seq.

9 **B. The Requisite Burden of Proof.**

10 As may be noted from the preceding discussion in Section II(A), the decision making  
11 process and criteria set forth under Arizona's statutory scheme for siting power plants and  
12 transmission lines are specific and exacting in nature. Given that circumstance, it would appear  
13 that the proponent of any substantive changes to a Commission decision previously granting a  
14 CEC should be required to provide the Commission with tangible information of a "clear and  
15 convincing" nature as to both the need for and the appropriateness of the requested amendments or  
16 modifications. A simple "preponderance" of supporting information would not appear to be  
17 adequate, at least in those instances where (i) the requested changes would adversely impact  
18 persons who may have reasonably relied on the Commission's previous decision or would be  
19 adversely affected by the changes now being proposed, and/or (ii) the argument(s) being advanced  
20 in support of the requested change(s) have been previously considered and rejected by the  
21 Commission and the Siting Committee.<sup>4</sup>

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23  
24 <sup>3</sup> The above quoted language appears in that portion of A.R.S. § 40-360.07 which deals with Commission  
25 consideration of requests for review of a decision of the Siting Committee by a person or persons dissatisfied with  
26 such decision. However, in practice, in recent years the Commission appears to have included both the findings of fact  
and conclusions of law contemplated by the above-quoted language in decisions granting or denying CECs, whether or  
not there was a request for review.

27 <sup>4</sup> However, if the change in question would not adversely affect others and is occasioned by circumstances not  
28 previously considered by the Siting Committee and Commission, then perhaps a supportive showing by a  
"preponderance" would be permissible.

LAWRENCE V. ROBERTSON, JR.  
ATTORNEY AT LAW  
P. O. Box 1448  
Tubac, Arizona 85646

III.

CONCLUSION

For the reasons discussed in Section II above, Peoria and DVI believe that (i) in determining whether or not to amend or modify Decision No. 70850 in the limited manner requested by APS in its July 17, 2014 Application in the Instant Proceeding, the Commission should adhere to the decision making standards prescribed for the Commission in A.R.S. § 40-360.07(B), as discussed in Section II(A) above; and, (ii) in determining whether or not the changes to Decision No. 70850 requested by APS should be granted, the Commission should require a "clear and convincing" demonstration that such changes are appropriate within the conceptual framework of A.R.S. §§ 40-360 et seq., if one or more of the circumstances or instances discussed in Section II(B) above is present.<sup>5&6</sup>

Dated this 10<sup>th</sup> day of October, 2014.

Office of the City Attorney  
City of Peoria

Lawrence V. Robertson, Jr.  
for Stephen J. Burg  
Chief Assistant City Attorney

and

Lawrence V. Robertson Jr.

Lawrence V. Robertson, Jr.

<sup>5</sup> As previously noted, depending upon the circumstances surrounding a given request for a change or changes pursuant to A.R.S. § 40-252, sometimes the information provided by the applicant can be incorporated into a Commission Staff Report, which will be sufficient for decisional purposes. On other occasions, that information may be submitted in an evidentiary hearing and thereafter reflected in a transcript. The form, in each instance, is up to the Commission to determine.

<sup>6</sup> In reaching its conclusion as to that burden of proof to be required of APS, DVI anticipates that, based upon statements made by counsel for SFI Grand Vista LLC during the October 6, 2014 Procedural Conference, the Commission will have before it information from at least one party alleging that (i) such party has reasonably relied on Decision No. 70850, (ii) such party would be adversely affected by a Commission decision granting one or more of the amendments or modifications to Decision No. 70850 requested by APS in its July 17, 2014 Application, and/or (iii) arguments advanced in support of one or more of the changes requested by APS were previously considered and rejected by the Siting Committee and the Commission.

LAWRENCE V. ROBERTSON, JR.  
ATTORNEY AT LAW  
P. O. Box 1448  
Tubac, Arizona 85646

Of Counsel to Munger Chadwick, PLC  
Attorney for Diamond Ventures, Inc.

The ORIGINAL and thirteen (13)  
copies of the foregoing will be filed  
the 10<sup>th</sup> day of October 2014 with

Docket Control  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

A copy of the foregoing will be  
emailed/mailed this same date to:

John Foreman, Chairman  
Arizona Power Plant and Transmission  
Line Siting Committee  
Office of the Attorney General  
PAD/CPA – 2<sup>nd</sup> Floor  
1275 W. Washington Street  
Phoenix, Arizona 85007

Janice Alward, Chief Counsel  
Legal Division  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

Steven M. Olea, Director  
Utilities Division  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

Ruben Ojeda, Manager  
Rights of Way Section  
Arizona State Land Department  
1616 West Adams Street  
Phoenix, Arizona 85007

James Braselton  
Gary L. Birnbaum  
Dickinson Wright PLLC  
1850 North Central Avenue, Suite 1400  
Phoenix, Arizona 85004  
Attorneys for SFI Grand Vista

Mr. Art Othon  
Office of the City Attorney  
8401 West Monroe Street  
Peoria, Arizona 85345

Mark A. Nadeau  
Shane D. Gosdis  
DLA Piper US LLP  
2525 E. Camelback Road, Suite 1000  
Phoenix, Arizona 85016  
Attorneys for 10,000 West, L.L.C.

Meghan Grabel  
Thomas L. Mumaw  
Pinnacle West Capital Corporation  
P.O. Box 53999, Mail Station 8695  
Phoenix, Arizona 85072-3999

Robert N. Pizorno  
The Pizorno Law Firm PLC  
4800 N. Scottsdale Road, Suite 6000  
Scottsdale, Arizona 85251

Court Rich  
Ryan Hurley  
Rose Law Group PC  
7144 E. Stetson Drive, Suite 300  
Scottsdale, Arizona 85251  
Attorneys for Warrick 160, LLC and  
Lake Pleasant 5000, LLC

LAWRENCE V. ROBERTSON, JR.  
ATTORNEY AT LAW  
P. O. Box 1448  
Tubac, Arizona 85646

1 Thomas H. Campbell  
Michael Hallam  
2 Lewis Roca Rothgerber, LLP  
201 E. Washington Street, Suite 1200  
3 Phoenix, Arizona 85004  
Counsel for Applicant, APS  
4

5 Scott McCoy  
Earl, Curley Lagarde, PC  
3101 N. Central Avenue, Suite 1000  
6 Phoenix, Arizona 85012  
Attorneys Elliott Homes, Inc.  
7

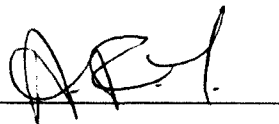
8 Joseph Drazek  
Quarles & Brady, LLP  
One Renaissance Square  
9 Two North Central Avenue  
Phoenix, Arizona 85004  
10 Attorneys for Vistancia, LLC  
11

12 Scott S. Wakefield, Esq.  
Ridenour Hinton & Lewis, PLLC  
201 North Central Avenue, Suite 3300  
13 Phoenix, Arizona 85004  
Attorneys for DLGC II, LLC and  
14 Lake Pleasant Group, LLP

15 Michael D. Bailey, City Attorney  
City of Surprise  
16 16000 N. Civic Center Plaza  
Surprise, Arizona 85374  
17

18 Garry D. Hays  
The Law Offices of Garry D. Hays, PC  
19 1702 East Highland Avenue, Suite 204  
Phoenix, Arizona 85016  
20 Attorney for Arizona State Land Department

21 Frederick E. Davidson  
Chad R. Kaffer  
22 The Davidson Law Firm  
8701 East Vista Bonita, Suite 220  
23 P. O. Box 27500  
Scottsdale, Arizona 85255  
24

25   
26

Jeanine Guy, Town Manager  
Town of Buckeye  
1101 E. Ash Avenue  
Buckeye, Arizona 85326

Dustin C. Jones  
Jon M. Paladini  
Tiffany & Bosco, PA  
2525 East Camelback Road, Seventh Floor  
Phoenix, Arizona 85016-9240  
Attorney for Anderson Land and Development,  
Inc.

Jay Moyes  
Moyes, Sellers & Sims LTD  
1850 North Central Avenue, Suite 1100  
Phoenix, Arizona 85004  
Attorneys for Vistancia Homeowners  
Associations

Andrew E. Moore  
Earl, Curley, Lagarde, PC  
3101 North Central Avenue, Suite 1000  
Phoenix, Arizona 85012  
Attorneys for Woodside Homes of Arizona, Inc.

Charles W. and Sharie Civer  
42265 N. Old Mine Road  
Cave Creek, Arizona 85331-2806

Christopher Welker  
Holm Wright Hyde & Hays PLC  
10201 South 51<sup>st</sup> Street, Suite 285  
Phoenix, Arizona 85044  
Attorneys for LP 107, LLC

Coash & Coash, Inc.  
Court Reporting, Video and Videoconferencing  
1802 North 7<sup>th</sup> Street  
Phoenix, Arizona 85006